(15)



No. 95-1340

IN THE

# Supreme Court of the United States

October Term, 1996

HUGHES AIRCRAFT COMPANY,

*PETITIONER,*

v.

UNITED STATES *EX REL.* WILLIAM J. SCHUMER,

*RESPONDENT.*

**On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit**

**BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE AMERICAN HOSPITAL ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

1. Whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 conduct.
2. Whether the False Claims Act permits employees of government contractors to file "parasitic" *qui tam* actions based on allegations disclosed by the Government in an audit or investigation.
3. Whether the False Claims Act imposes liability for alleged infractions of other statutes or regulations regardless of whether such infractions result in a "false claim" against the public fisc.

For ease of reference, these are the revised questions set forth in Petitioner's main brief. The questions are a clarification of the original questions presented in the petition for *certiorari*.

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## INTRODUCTION

This case will resolve two diverse issues under the civil False Claims Act, 31 U.S.C. §§ 3729-3733, of significant interest to *amici*.[1] The first of these issues (revised Question 2) is the proper interpretation of the term "public disclosure" found in 31 U.S.C. § 3730(e)(4)(A), which specifically limits subject matter jurisdiction for actions under the civil False Claims Act brought by private *qui tam* relators. The Court of Appeals for the Ninth Circuit interpreted the term "public disclosure" so narrowly that it permitted an employee of petitioner to proceed with a *qui tam* case even though that employee restated allegations in four Federal audit reports that had been disclosed long before the *qui tam* suit was filed. Both the express language and the purpose of Section 3730(e)(4)(A) demonstrate that, unless brought by an "original source," such a parasitic suit is barred. The second issue to be resolved (revised Question 3) is whether the Court of Appeals properly held that a relator could assert a cause of action under the civil False Claims Act for a regulatory violation even if the alleged violation did not and could not cause a financial loss to the United States. In this case, the alleged "fraud" even resulted in a financial benefit to the government. The Court below improperly ruled that harm to the Federal treasury was not an essential element under the False Claims Act.

*Amici* urge this Court to reverse on both issues.

## INTEREST OF *AMICI CURIAE*

The Association of American Medical Colleges ("AAMC") was founded more than a century ago to improve the process and quality of medical education. Its members include all accredited medical schools in both the United States and Canada; nearly 400 major teaching hospitals; more than 90 academic and professional societies representing

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[1] *Amici* will not address the retroactivity issue addressed in revised Question 1.

some 72,000 members of medical facilities; and students and medical residents at these schools and hospitals.

The American Hospital Association ("AHA") is the primary national membership organization for hospitals in this country, consisting of approximately 5,400 hospitals and other healthcare institutions. The AHA's goal is to promote high-quality healthcare and health services through leadership and assistance to hospitals in meeting the healthcare needs of their communities. Many of the AHA's members are teaching hospitals.

The American Medical Association ("AMA"), founded nearly 150 years ago, is a private, non-profit organization of physicians. With 290,000 members who practice in all 50 states and in all fields of medicine, the AMA is the primary national organization of physicians in America. The AMA is dedicated to promoting the art and science of medicine and the betterment of public health, and serves physicians and patients by, among other things, establishing and promoting ethical, educational, and clinical standards for the medical profession.

These three associations (collectively the "Healthcare Associations") have a compelling interest in the proper resolution of the questions at issue in this case. The members of the Healthcare Associations, either individually as physicians or institutionally as hospitals, deliver health services to an overwhelming majority of citizens in this country. A significant part of those health services are fully or partially funded by the Federal government through a variety of programs, including Medicare[2] (healthcare for the aged), Medicaid[3] (healthcare for the poor and disabled), CHAMPUS[4]

[2] Codified in various sections of Title 42 of the United States Code, primarily at 42 U.S.C. § 1395, *et seq.*

[3] Codified in various sections of Title 42 of the United States Code, primarily at 42 U.S.C. § 1396, *et seq.*

[4] 10 U.S.C. ch. 55; *see* 32 C.F.R. § 199.



(healthcare for civilian dependents of military personnel), the Railroad Retirement Act[5] (benefits including Medicare-like coverage for retired or disabled railroad workers), and other Federal healthcare programs. Like contractors in the defense industry, providers of health services under these programs are highly regulated by various Federal agencies. These Federal agencies, along with Federal claims processing contractors and related state agencies, conduct both routine and special investigations, audits and reviews of program and financial operations of members of the Healthcare Associations. These audits, reports and reviews are regularly circulated to various employees and agents outside of the government.

The Healthcare Associations, and their members, are committed to providing high-quality medical services to the American people in full compliance with all rules and regulations adopted for such programs. Nonetheless, the complexity of the rules and regulations under which these programs operate often makes such compliance difficult, resulting in numerous disputes over regulatory interpretation and compliance. As a result, in the past ten years, various members of the Healthcare Associations have found themselves defending lawsuits by individuals -- called *qui tam* relators -- alleging that these regulatory disputes amount to "false and fraudulent" claims in violation of the False Claims Act, and that the Act's full remedies of treble damages plus penalties of $5,000 to $10,000 per false claim are applicable to these regulatory disputes. As Congress and the Federal enforcement agencies focus more on allegations of healthcare fraud, these *qui tam* cases are increasing rapidly.[6]

[5] 45 U.S.C. § 231, *et seq.*

[6] Indeed, the last three years have seen a dramatic shift in the attention of *qui tam* relators towards the healthcare industry. Whereas *qui tam* recoveries related to alleged healthcare fraud represented approximately 1 to 8 percent of the total *qui tam* recoveries in the years 1988 to 1992,

In many instances, these relators are not original sources of the allegations. Instead, they learn of these violations from auditors or investigators of the Federal government or its agents, the contractors who process and pay the claims on behalf of the government, or from the healthcare institutions themselves, who are conducting internal audits at the request, and often at the insistence, of the Federal government. The Healthcare Associations believe that such parasitic *qui tam* suits are barred by the subject matter jurisdictional provision of the False Claims Act, 31 U.S.C. § 3730(e)(4). Accordingly, they seek reversal of the decision below because the interpretation of the term "public disclosure" by the Court of Appeals was unreasonably narrow and would subject the members of the Healthcare Associations to numerous unwarranted parasitic *qui tam* suits.

Indeed, absent some clarification by this Court, the future is likely to hold even more opportunities for parasitic suits by opportunistic *qui tam* relators seeking to extract settlements. For instance, in June 1996 the Department of Health and Human Services Office of the Inspector General ("OIG") commenced the Physicians At Teaching Hospitals ("PATH") initiative, a series of nationwide compliance audits focusing primarily upon the Medicare rules governing the billing of physician services provided by residents and their teaching physicians. (*See Amici* App. at 4a through 6a). As part of the PATH initiative, OIG "encourages" internal audits within the teaching hospitals by offering potential liability reductions if such internal investigations are implemented in compliance with an OIG protocol. This protocol limits whom the party may select as the investigator; requires the waiver of all privileges, including attorney-client privilege, and rights to withhold documents; and permits the government to receive all draft audit reports and to be present for any relevant discussions with the independent reviewer. At every stage of this process, the institution must fear that an opportunistic individual, who learns of the regulatory noncompliance only through the PATH audit, could seek to file a *qui tam* case and argue that no "public disclosure" has occurred.

healthcare-related *qui tam* recoveries accounted for 36 to 46 percent of total *qui tam* recoveries in 1993, 1994, and 1995. (*See Amici* App. at 3a).



The PATH initiative is just one example of future audits and reviews of program compliance likely to be conducted by the members themselves at government direction.[7] The enormous complexity of the Federal healthcare regulatory system, and the desire of members of the Healthcare Associations to discover and resolve any regulatory disputes with the government, will result in increasing reliance, both by the government and the members, on initiatives like PATH. Absent this Court's clarification of the jurisdictional bar, initiatives in which both the government and the industry are auditing compliance with a complex regulatory scheme will likely be fertile grounds for opportunistic *qui tam* relators who will simply lie in wait until these audits provide the necessary informational framework for a *qui tam* action.

In addition, members of the Healthcare Associations have been threatened, both by *qui tam* relators and by government attorneys, with False Claims Act ("FCA") suits seeking penalties in the millions of dollars even though the government suffered no financial loss. In most cases, these situations arise because the government (or commonly the relator alone) believes that a healthcare provider is violating a statute or regulation whose violation has no impact on the

[7] The Secretary of Health and Human Services announced in June 1995 a pilot voluntary disclosure program for the healthcare industry modeled on the voluntary disclosure program that has been in operation for many years at the Department of Defense. Although initially limited to key states and specific types of healthcare service providers, the Secretary stated her intent that this program will be a nationwide program. Like PATH, a healthcare institution which is accepted into the HHS voluntary disclosure program is "strongly encouraged" to conduct a full financial audit and review and report to HHS about the results of that internal audit.

Federal treasury and would generate no "damages." Despite this lack of financial harm, these plaintiffs seek to extract large settlements by arguing that the FCA nevertheless allows imposition of the civil penalties found in 31 U.S.C. § 3729(a) of between $5,000 to $10,000 for each alleged false claim.

The Healthcare Associations believe that use of the False Claims Act in such situations is abusive and beyond the scope of the Act. Indeed, the assertion by the *qui tam* relator in this case that a violation of the False Claims Act can exist without financial loss to the Federal treasury exemplifies the manner in which the Act is abused by private *qui tam* relators and the government in an attempt not to remedy losses, but to bully members of *amici* into inflated settlements. The relator's argument has no basis in the language or purpose of the Act, and *amici* urge this Court to reject the holding of the Court of Appeals.

In recognition of the AAMC's, the AHA's and the AMA's interest in this case, the parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

I. The limitation on subject matter jurisdiction found in 31 U.S.C. § 3730(e)(4) balances two competing interests: to bar "parasitic" *qui tam* suits based on allegations already disclosed either through the public media or through existing government audits and investigations and, at the same time, to encourage true "whistleblowers" to come forward with evidence of fraud. By passing Section 3730(e)(4) in 1986, Congress intended to overrule the result in cases such as *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), in which, under the pre-1986 jurisdictional bar, true whistleblowers who had brought evidence of fraud to the attention of Federal auditors and investigators were barred from bringing a *qui tam* suit.

Congress fashioned a two-step remedy in 1986 that barred *qui tam* cases which reassert "publicly disclosed" allegations or transactions, unless the relator who brings the case is an "original source." Under this jurisdictional regime, once the allegations of fraud are "publicly disclosed," an FCA suit may be brought only by the government itself (which is not affected by this jurisdictional bar) or by a true whistleblower -- an "original source" -- who knew of the fraud and voluntarily disclosed the allegations to the government in the first instance, precisely the situation of the State of Wisconsin in the *Dean* case cited above.



The initial question in the application of this jurisdictional bar is whether the allegation or transaction has been "publicly disclosed" in one of many ways: in the course of a civil or criminal hearing or trial; in a government report, hearing, audit or investigation; or in the news media. This requirement for "public disclosure" was designed by Congress as a threshold test, a "quick trigger," to determine which cases warrant the more exacting determination of whether the relator is an "original source" that Congress intended to encourage and reward.

The restrictive interpretation of the term "public disclosure" in the Court of Appeals decision below is contrary to both the language and the purpose of the jurisdictional bar. The language in Section 3730(e)(4)(A) does not limit the nature, form or extent of the disclosure necessary for that disclosure to be "public." The disclosure could be written (*e.g.*, "report") or oral (*e.g.*, "hearing"). The disclosure can be to large numbers (*e.g.*, in the "news media") or small numbers (*e.g.*, in an "audit or investigation"). Congress intended only that the allegations or transactions be disclosed outside the government, where an opportunistic relator might file a parasitic *qui tam* suit. This "quick trigger" guarantees that whenever a parasitic suit is possible -- that is, whenever there has been any form of public disclosure -- only the true whistleblower, the "original source," may file the *qui tam* case.

II. Since its passage in 1863, the civil False Claims Act has always been intended and applied as a remedial statute to

reimburse the Federal treasury for financial loss resulting from fraud. The FCA is not, and has never been, an all-purpose remedy for any type of regulatory violation. The conclusory holding of the Court of Appeals below that "the lack of . . . actual harm from the [regulatory] violation does not preclude a claim under the FCA" not only misreads the Supreme Court case cited, but also disregards over 70 years of law on this subject.

In that time frame, this Court has found civil False Claims Act liability only in those cases in which there has been financial loss to the Federal treasury. Other cases, despite finding regulatory or statutory violations, have found no False Claims Act liability where the government can show no financial loss. The per-claim "penalties" in the civil False Claims Act, now $5,000 to $10,000 per false claim, were designed not to penalize regulatory violations but as a form of "rough justice" to remedy those situations where the financial loss is certain but difficult to calculate. Both the damages and the penalties imposed under the FCA are intended to remedy financial harm caused by fraud; they are not intended to punish false statements or regulatory violations resulting in no financial loss in order to fund the payroll for government auditors and investigators.

## ARGUMENT

### I. GIVEN CONGRESS' CLEAR INTENT TO BAR PARASITIC SUITS, DISCLOSURE OF ALLEGATIONS TO ANY SEGMENT OF THE PUBLIC IN THE COURSE OF A GOVERNMENT OR GOVERNMENT-MANDATED AUDIT OR INVESTIGATION IS "PUBLIC DISCLOSURE" UNDER 31 U.S.C. § 3730(e)(4)(A)

The 1986 amendments to the False Claims Act, while clearly intended to expand the role of *qui tam* relators in False Claims Act litigation, were just as clearly intended to bar "parasitic" suits in which a *qui tam* relator simply reasserts



allegations that the government is already investigating or that others have already disclosed. In furtherance of these goals, Congress enacted the jurisdictional bar in 31 U.S.C. § 3730(e)(4), which provides a two-part test for subject matter jurisdiction. Specifically, the False Claims Act bars *qui tam* actions

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In short, if the allegations have been "publicly disclosed," then the *qui tam* relator must be an "original source," as that term is defined in 31 U.S.C. § 3730(e)(4)(B).[8]

The jurisdictional bar, of course, does not prevent the government itself from remedying false claims, since it explicitly does not apply to the Attorney General. 31 U.S.C. § 3730(e)(4)(A). Instead, the jurisdictional bar applies *only* in those *qui tam* cases which the Attorney General has fully investigated and determined are not of sufficient merit to warrant intervention and prosecution by the Department of Justice. If the Department of Justice does intervene, then subject matter jurisdiction is established and questions regarding the "public disclosure" of allegations or the "original source" status of the *qui tam* relator are largely irrelevant. 31 U.S.C. § 3730(b). Moreover, the jurisdictional bar applies only where there has been disclosure (1) in a government

[8] Because the District Court and the Court of Appeals both held that the government had not made a public disclosure, if this Court reverses the Court of Appeals on the "public disclosure" issue, the lower courts would need to resolve the original source question.

hearing, audit, investigation or report -- in which case the government has already focused upon the plaintiff's allegations or transactions -- or (2) in a civil, criminal or administrative hearing or some form of news media coverage -- in which case the government is likely to learn of such allegations or transactions regardless of whether a *qui tam* action is filed. 31 U.S.C. § 3730(e)(4)(A). Thus, the government's ability to remedy false claims is not affected significantly by the issue at bar.[9]

Since Congress intended to bar parasitic actions based on allegations arising out of government inquiries disclosed to the public, the term "public disclosure" -- at least in the context of a disclosure of a government audit, report or investigation -- must encompass any disclosure to a non-government person or entity. The jurisdictional bar of the *qui tam* provisions of the FCA harmonizes the need to offer an incentive for informants to reveal frauds hidden from the government and the desire to prevent parasitic claims that offer no benefit to the government. To achieve this harmony, Congress excluded *qui tam* actions based upon allegations disclosed in the course of government hearings, audits, reports and investigations because such actions do not assist in exposing fraud but instead unfairly reward opportunistic plaintiffs who contribute nothing to the discovery

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[9] Indeed, *qui tam* cases pursued by relators after the government declines to intervene have made a minuscule contribution to government fraud recoveries in the nearly ten years of liberalized *qui tam* enforcement following the 1986 Amendments. As of October 1995 (the date of the most recent official DOJ press release on this subject), relators have recovered only $15 million in *qui tam* cases in which the government, after investigation, declines to intervene and allows the relator to proceed alone. That sum is trifling compared to the $1.13 billion in recoveries in *qui tam* cases in which the government intervenes and prosecutes the civil claims. *See* U.S. Department of Justice Press Release, *Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements*, October 18, 1995. (*Amici* App. at 1a-3a). In other words, *qui tam* cases pursued by the Department of Justice account for nearly 99 percent of the total false claims recoveries to the government in cases originally filed by *qui tam* relators.



of fraud. This common sense interpretation of "public disclosure" would not preclude *qui tam* actions by true whistleblowers, of course, because a *qui tam* action based on publicly disclosed information may still be brought by an "original source," as defined in 31 U.S.C. § 3730(e)(4)(B).

In this context, it makes little difference how widely the government's disclosure of the relevant allegations of false claims was disseminated. The fact that such allegations are "public" -- that is, are disclosed outside of the government and are no longer private -- creates, virtually by definition, the risk of a parasitic claim. Moreover, barring such claims, even where the public disclosure was not widely disseminated, does not undermine the purposes of the FCA. *Qui tam* plaintiffs who merely repeat allegations upon which the government has already focused its inquiries, and who are not "original sources," contribute nothing to the government's efforts at ferreting out false claims. Accordingly, whether or not the government's public disclosure is widespread or limited, this type of *qui tam* action does not in any meaningful way contribute to the government's efforts to uncover and remedy fraud.

Here, Schumer's *qui tam* complaint is based upon allegations contained in several government audit reports going back over three years that were disclosed to various innocent individuals at Hughes and at Northrop, the prime contractor, which was unquestionably innocent of any allegation of wrongdoing. His complaint added nothing to the government's efforts at uncovering fraud. Thus, the claim falls squarely in the category of parasitic claims excluded by the jurisdictional bar of the *qui tam* provisions unless brought by an original source.

### A. The Historical Development Of The Jurisdictional Bar To "Parasitic" *Qui Tam* Suits

The meaning of the term "public disclosure," and the applicability of the jurisdictional bar to Schumer's claims, becomes apparent through an analysis of Congress' intent in

crafting the jurisdictional bar in 1986. The history of the jurisdictional bar reveals Congress' intent to exclude "parasitic" *qui tam* suits and reward true whistleblowers.

Congress enacted the False Claims Act, including the *qui tam* enforcement procedures, in 1863 to address allegations of rampant fraud by Union contractors during the Civil War. S. Rep. No. 99-345, at 8-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. (100 Stat.) 5266, 5273-75. The *qui tam* provisions of the FCA were included in order to meet Congress' goal of "setting a rogue to catch a rogue" by inducing informers "to betray [their] coconspirators." Cong. Globe, 37th Cong., 3d Sess. 955-96 (Feb. 14, 1863). Congress accomplished this purpose by permitting anyone at all to bring such *qui tam* actions. This original statute contained no jurisdictional bar.

Congress first enacted a jurisdictional bar in 1943 upon recognizing that the original statute permitted such free use of the *qui tam* provisions that opportunistic relators could file parasitic claims that contributed little or nothing to the government's efforts at unearthing fraud but nevertheless resulted in windfall recoveries to the relators. Congress' recognition of this problem was triggered primarily by the case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which a plaintiff who had no personal knowledge of a false claim simply copied the indictment as his *qui tam* complaint. The Court found a lack of statutory language barring such cases and, stating that the recovery of money to the government was itself a contribution that satisfied the intent of the FCA, permitted the *qui tam* action to stand. *Id.* at 545.

Congress quickly rejected the Court's reasoning that the mere recovery of money by the federal treasury justified such *qui tam* actions and reversed the Court's allowance of such parasitic cases in which the relator offers the government no assistance in uncovering fraud. Within the year, Congress amended the FCA by inserting a jurisdictional bar to prevent such parasitic actions. Act of December 23, 1943, 57 Stat.



608, *recodified in* 31 U.S.C. § 3730(b)(4) (1982) (superseded); S. Rep. No. 78-291 (June 8, 1943); S. Rep. No. 77-1708 (Nov. 25, 1942).

Congress, however, overcompensated for the problem of parasitic suits in two ways. First, the 1943 jurisdictional bar excluded any action based upon information in the possession of the government, whether or not it was part of a government audit, investigation, report or other proceeding. Second, and most importantly, the 1943 amendment contained no exception for true whistleblowers, *viz.*, the informants who were the original source of the government's knowledge. Act of December 23, 1943, 57 Stat. 608, *recodified in* 31 U.S.C. § 3730(b)(4) (1982) (superseded). Accordingly, even plaintiffs who first made the government aware of a fraud were barred from filing *qui tam* actions. The best example of this overcompensation, according to a later Congress, is the case of *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). S. Rep. No. 99-345, at 12-13. In that case, a *qui tam* action by the State of Wisconsin was dismissed on the basis of the pre-1986 jurisdictional bar of "government knowledge" even though the Federal government only learned of the fraud because of Wisconsin's extensive investigation.

The present jurisdictional bar is the result of Congress' correcting this overcompensation and seeking simply to implement "what it apparently thought it had in 1943: a law requiring that the relator be the original source of the government's information." *Wang v. FMC Corp.*, 975 F.2d 1412, 1410 (9th Cir. 1992) (*citing* S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269).[10] Thus,

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[10] The full quote by the Court in *Wang* is instructive:

"This restrictive interpretation [in the *Dean* case] was too much for Congress. In part, the 1986 amendments to the Act were 'aimed at correcting restrictive [court] interpretations of the act's . . . *qui tam* jurisdiction' provisions. *Senate Report*, at 4, 1986 U.S.C.C.A.N. 5269. The 1986 amendments to *qui*

Congress intended to refine the line between encouraging private citizens to expose fraud to the government and avoiding parasitic suits by opportunistic plaintiffs who do not meaningfully contribute to that goal. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991); *Wang v. FMC Corp.*, 975 F.2d at 1419; *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress' action resulted in the two-part test now found in 31 U.S.C. § 3730(e)(4). The "public disclosure" element of that test must be broadly construed to fulfill this dual purpose.

### B. The Court of Appeals' Restrictive Interpretation Of "Public Disclosure" Is Inconsistent With The Language And Intent Of Section 3730(e)(4)

Congress' intent to exclude parasitic claims clearly requires that the term "public disclosure" be broadly applied to encompass any disclosure to a person or entity outside of the government, *i.e.*, any member of the general public. *United States ex rel. Doe v. John Doe, supra*, 960 F.2d at 323; *United States ex rel. Fine v. Advanced Sciences, Inc.*, ___ F.3d ___, No. 95-2014, 1996 WL 638448 (10th Cir. Nov. 6, 1996).[11]

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*tam* jurisdiction were remedial, not innovative. Congress wanted in 1986 what it apparently thought it had in 1943: a law requiring that the relator be the original source of the *government's* information. Seeking only to 'correct' opinions like *Dean*, Congress permitted one who publicly disclosed the information to bring a *qui tam* suit. There is nothing to suggest that Congress meant to do any more than that, and some evidence that it meant to do less. *See* § 3730(e)(2)(A) (*qui tam* suits against political officials still barred if involving information already possessed by the government)." *Wang*, 975 F.2d at 1419 (emphasis in original).

[11] The Court of Appeals for the Tenth Circuit has also discussed this issue in two other cases. In *United States ex rel. Precision Co. v. Koch*



Congress intended, as detailed above, that the jurisdictional bar prevent parasitic claims by any individual whose claims or allegations have already been addressed and disclosed to any segment of the public by, among other methods, a government hearing, audit, investigation or report. This jurisdictional bar certainly cannot depend upon how widely the government disseminated such information. If allegations in a government report or audit were disclosed to a member of the general public, there is an immediate threat of a *qui tam* action by a relator who did not contribute to the disclosure of the fraud. Such an action is parasitic. It does not further the goals of uncovering fraud, and it simply rewards individuals who have contributed nothing to combatting fraud. It matters little whether the government disclosed such allegations to five, five hundred, or five million individuals. Any disclosure outside of the government raises the threat of a parasitic claim.

Congress' intent to adopt a broad definition of "public disclosure" is evident in the statutory language. Section 3730(e)(4)(A) encompasses a number of different types of disclosure. "Public disclosure" includes written disclosures (in "reports") as well as oral disclosures (in criminal or civil "hearings"). "Public disclosure" includes both wide public release in the "news media," as well as much more limited disclosure in an administrative "audit or investigation." This language is intended to cover a broad spectrum.

The requirement of public disclosure simply identifies a broad category of potentially parasitic cases to be subjected to

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*Industries, Inc.*, 971 F.2d 548, 553 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993), the Court held that the determination of "public" is not based on how many people were informed of the alleged fraud. The only issue is whether the disclosure is made to any member of the public not previously informed. *See also United States ex rel. Fine v. MK-Ferguson Co.*, ___ F.3d ___, No. 95-2011, 95-2021, 1996 WL 638479 (10th Cir. Nov. 6, 1996).

the more exacting and more precise "original source" analysis. *Cf., Precision Co.*, 971 F.2d at 552-53. As the Court of Appeals for the Tenth Circuit recognized, the dual goals of Section 3730 -- to encourage the exposure of fraud by informers and to avoid parasitic claims by opportunists who do not contribute to unearthing the fraud -- are carried out primarily through the original source exception, *id.*, which is the heart and soul of the FCA's jurisdictional bar. *Wang*, 975 F.2d at 1410. Interpreting "public disclosure" broadly to include disclosure outside of the government fulfills these dual purposes of the *qui tam* provisions of the FCA, permitting full application of the "original source" test.[12]

Nor is a broad interpretation of "public disclosure" inconsistent with the FCA's goal of encouraging informers to come forward. Once the government has initiated or conducted an inquiry into a fraud, there is simply no need to provide such an incentive unless, as is the case with those relators who are original sources, they have already contributed to the disclosure. In addition, a restrictive interpretation of "public disclosure" would be inconsistent with the Congressional purpose to encourage and reward true whistleblowers. If "public disclosure" is interpreted narrowly, as in the decision below, the logical result is a race to the courthouse by which an opportunistic relator who adds nothing to the government's investigation of fraud may be the first to file a *qui tam* case and may thus exclude the true whistleblower, the "original source," from filing a *qui tam* case.[13]

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[12] A broad interpretation of "public disclosure," tending to restrict jurisdiction, is also more consistent with the Court's long-held understanding that statutory grants of jurisdiction to federal courts should be strictly construed; federal courts should "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971); *Healy v. Ratta*, 292 U.S. 263, 270 (1934).

[13] Under 31 U.S.C. § 3730(b)(5), once a *qui tam* case is brought, no other person other than the government may intervene or bring another *qui tam*



Moreover, a broad interpretation of "public disclosure" is also consistent with general principles of judicial economy. A restrictive interpretation of "public disclosure" would require a pre-trial jurisdictional inquiry into the extent to which the government had publicly disclosed the relevant allegations or transactions and the sufficiency of such disclosures for the purposes of the jurisdictional bar. Such a pre-trial jurisdictional inquiry would be "onerous, impractical, and ultimately would serve neither the interests of the parties nor the court." *Precision Co., supra*, 971 F.2d at 553. In many cases, ascertaining the scope of such public disclosure would be nearly impossible. The parties, and the court, would be forced to make inquiries regarding every federal employee who could have made such a disclosure, every member of the general public who spoke to a federal employee regarding topics related to the relevant allegations or transactions, every person who received communications from those individuals on such topics, *ad infinitum* -- all in the context of a pre-trial jurisdictional determination. Unlike the discrete, focused inquiry that can be made in the context of determining whether the *qui tam* relator is an "original source," the inquiry required to determine the scope of public dissemination would be endless. Conducting such an inquiry in the course of a full trial is difficult; expecting it in a pre-trial jurisdictional inquiry seems more than a little absurd. *Id.*

Similarly, to the extent the Ninth Circuit may be concerned about a return to the pre-1986 government knowledge standard, *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995), Pet. App. at 10a, such concern is misguided. Not only does the jurisdictional bar now contain an exception to allow a *qui tam* case to be filed by an "original source" -- a significant exception which did not exist before 1986 -- but Congress also has limited the ju-

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case based on those same facts. A broad interpretation of "public disclosure" thus reserves the right to file a *qui tam* case for the "original source."

risdictional bar to public disclosures "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). This category is somewhat more narrow than the pre-1986 standard of mere "government knowledge" by some employee in some agency. Moreover, the creation of the jurisdictional bar was premised upon the determination that a *qui tam* suit restating allegations already unearthed through government inquiries, and which contributes nothing to the uncovering of fraud, was parasitic and undesirable. In any event, under the present jurisdictional bar, the mere existence of a government investigation is not enough to bar a *qui tam* action. Instead, there must be a disclosure (1) in the course of that investigation (2) to a member of the general public (3) of the relevant allegations and/or transactions relating to a false claim; and, most importantly, (4) the plaintiff must not be an original source. 31 U.S.C. § 3730(e)(4)(A).

Here, Schumer's *qui tam* suit contributed nothing to the uncovering of a fraud. Acting upon information given to the government by Northrop, the government conducted audits of possible fraudulent conduct. Once the inquiry was completed, the government then distributed the findings in the audit reports, which alleged improper allocation of costs resulting in possible unauthorized charges to the government, to innocent employees of Hughes and Northrop. The government initially withheld $15.4 million, and ultimately paid the amount after it determined that the alleged misallocation in fact was favorable to the government. Only after the government had fully addressed the allegations did Schumer file this action alleging, in substance, what was contained in the government's audit reports -- exactly the type of parasitic claim Congress never intended unless brought by an original source. This narrow interpretation by the Court of Appeals must be reversed.



### C. "Public Disclosure" Also Includes Disclosure Through Internal Audits By Healthcare Institutions

*Amici* submit that the phrase "administrative audits, reports and investigations" is not limited solely to such inquiries by the government alone. For example, as discussed above, the Inspector General of the United States Department of Health and Human Services is demanding that many healthcare providers conduct audits of alleged regulatory noncompliance and report those findings directly to the Secretary. These investigations and audits, while nominally conducted by the institutions, are in fact administrative reviews conducted at the express request of, and under rules set by, the government. As such, disclosure of allegations from such audits and investigations should also be considered "public" disclosure through an administrative audit or investigation under 31 U.S.C. § 3730(e)(4)(A).

Information uncovered during audits such as those performed pursuant to the Inspector General's PATH initiative is certain to be brought to the attention of the government, making whistleblowers unnecessary. However, during both the investigative stage, when facts are developing, and at the reporting stage, when the audit results are reported both to the government and to other non-government entities, the allegations are certain to be more widespread. As a result, such "internal" audits are fertile ground for opportunistic *qui tam* relators.

As detailed above in the statement of interest of the *amici curiae*, the PATH audits demanded by the government are investigations which will inform the government of any regulatory noncompliance as effectively as if the audits were performed by the government itself. Hospitals performing audits pursuant to the PATH initiative must waive all privileges and must submit to the presence of government investigators during any relevant discussions with the auditors. Moreover, the audits must be performed by government-

approved independent investigators, who must follow government-dictated procedures during the course of their investigations. Such investigations are thus designed to *function as government audits* -- that is, the PATH audits are designed not as private self-investigations initiated for purposes of ensuring compliance, but as a means of providing detailed information to the government regarding the extent of compliance. The PATH initiative is but one example of numerous government initiatives which prompt audits that are the functional equivalent of government-conducted audits and investigations. Under such circumstances, *qui tam* relators who have nothing new to contribute to the investigations are just as parasitic -- and the government needs their aid just as little -- as they are in cases based on investigations performed by government-employed auditors, rather than by private auditors acting at the government's behest.

## II. HARM TO THE PUBLIC FISC IS AN ESSENTIAL ELEMENT FOR A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT

The Ninth Circuit's decision stands for the rather remarkable position that the mere violation of a regulation by petitioner in the course of its performance of its contracts violates the civil False Claims Act even though the petitioner's action did not result in financial loss to the government. Indeed, the DCAA itself found that Hughes' conduct actually resulted in a positive *gain* for the government. The facts presented by this *qui tam* case demonstrate quite clearly why financial loss is an essential element of a False Claims Act violation.

There is no single act or type of act that generates liability under the False Claims Act; instead, those acts vary widely. *See* 31 U.S.C. § 3729 (a)(1)-(7). They include submission of a "false or fraudulent claim for payment" (subsection (a)(1)); entry into a "conspiracy to defraud" the government (subsection (a)(3)); deliberate concealment of government



property (subsection (a)(4)); or use of a false record to decrease an obligation to the government (subsection (a)(7)). What is common in all of these acts, however, is the existence of a financial or monetary loss to the Federal treasury.

The civil FCA was not intended to punish a claim, statement, conspiracy or other conduct which, while in violation of other Federal laws and regulations, does not result in a loss to the Federal treasury. It is not "designed to reach every kind of fraud practiced on the government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Rather, the FCA is a *remedial* statute designed to remedy the government's *pecuniary and proprietary losses* by compensating the Treasury for damages it suffered as a result of successful execution of fraud. *United States v. Halper*, 490 U.S. 435 (1989); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943) (the "chief purpose of the [civil FCA] was to provide for *restitution to the government of money* taken from it by fraud . . .") (emphasis added). The summary conclusion of the Court of Appeals decision below, that "the lack of determination of actual harm from the [regulatory] violation does not preclude a claim under the FCA," simply misconstrues the clear purpose of the False Claims Act.

### A. This Court Has Consistently Interpreted The False Claims Act As A Statute Designed To Recoup Losses To The Treasury

As explained above, the FCA was enacted during the Civil War, at the request of the War Department and the Treasury Department, as a response to rampant fraud committed by suppliers to the Union Army. Cong. Globe, 37th Cong., 3d Sess. 952 (1863). FCA liability was designed to reach overbilling and billing for substandard or nonexistent goods and services. The FCA's sponsoring senator noted, for example, that military contractors were billing the Army for artillery shells filled with sawdust rather than explosives. *Id.* at 955. The civil provisions of the FCA provide the government with "the privilege of coming upon [a fraudulent con-

tractor] or his estate and his heirs and recovering the money of which it is defrauded." *Id.* at 958. Congress' concern at the time was that "our Treasury is plundered day to day by bands of conspirators," *id.* at 955, with "diabolical schemes for the purpose of procuring money from a distracted, and what will in a short time be an impoverished country." *Id.* at 954. The FCA was plainly enacted to protect the public fisc, and its civil provisions were meant to recoup Treasury losses, not to penalize general dishonesty.

It strains credulity to argue that the FCA provides a *qui tam* relator or the government with a cause of action to penalize a technical regulatory violation which cost the Treasury *nothing* -- indeed, which in this case *saved* the government money. This Court has recognized repeatedly the distinction between false or fraudulent claims or other acts that "plunder the Treasury," and other false, fraudulent or illegal conduct which does not affect the public fisc, and thus do not fall within the scope of the FCA.

Seventy years ago, in *United States v. Cohn*, this Court emphasized that under the False Claims Act, actionable false claims are only those which fraudulently cause the government "pecuniary or property loss." 270 U.S. 339, 347 (1926).[14]

[14] The *Cohn* case, as well as the *Gilliland* and *Bridges* cases discussed *infra*, though criminal cases, are instructive as to the scope of the civil False Claims Act because of the historical development of the civil False Claims Act language. The original FCA passed in 1863 provided for both civil and criminal liability for the same proscribed acts. The FCA was later codified in the Revised Statutes of 1878. The criminal provisions were codified at Section 5438; the civil provisions, Section 3490, simply triggered civil liability on those acts identified in Section 5438. The criminal False Claims Act was slightly modified in 1909 and 1918, and was amended significantly in 1934 (*see Gilliland, infra*), but Section 5438 of the 1878 Revised Statutes, while no longer an operative criminal statute, continued to specify the acts giving rise to civil liability until the civil FCA was codified at 31 U.S.C. § 3729, *et seq.* by the 1986 FCA amendments. *See Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958); *United States v. Bornstein*, 423 U.S. 303, 305 n.1 (1976).



Cohn was indicted under the criminal False Claims Act, which at that time punished basically the same "acts" that resulted in a civil action under the civil portions of the Act. The indictment alleged that Mr. Cohn had fraudulently claimed a shipment of imported cigars from United States customs officials which the government possessed as bailee. This Court held that, because the government was a mere bailee with only temporary possession of the cigars, Cohn did not "defraud" the government within the meaning of the False Claims Act. He did not deprive the government of its money or property -- rather, he cheated the rightful owner of the cigars. *See id.* at 346-47. This Court squarely rejected the government's argument that the False Claims Act addresses such intangibles as "interference with lawful government functions," and held that the Act addresses fraud in "its usual and primary sense." *Id.* at 346.[15] Because Cohn did not "wrongfully obtain[] money [or] other property of the Government," *id.* at 347, his false claim to the goods did not violate the FCA. This Court has repeatedly cited *Cohn* with approval. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. at 545; *United States v. McNinch*, 356 U.S. 595, 600 n.10 (1958) (citing *Cohn* and holding that a "claim" under FCA applies only to claims for the government's money or property).

The Court again recognized the distinction between false statements made in furtherance of a fraudulent claim, and false statements which do not affect the public fisc, in *United States v. Gilliland*, 312 U.S. 86, 92-93 (1941). The Court in *Gilliland* distinguished the provisions addressed in *Cohn* from provisions which are "made to embrace false and fraudulent statements or representations where these were knowingly and

[15] The "usual and primary sense" of fraud is based on the common law principle that financial loss is an essential element of any claim for fraud. This is an age-old doctrine (*see, e.g.*, 26 C.J. 1169; *Ming v. Woolfolk*, 116 U.S. 599 (1886)) that still survives today. *See, e.g., Bastian v. Petren Resources Corp.*, 892 F.2d 680, 685 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990).

willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' " *Id.* at 93. This Court held that, unlike provisions addressing false *claims*, the false *statements* provision at issue -- which was later severed from the False Claims Act and became the False Statements Act -- in *Gilliland* was not restricted to "cases involving pecuniary or proprietary loss to the government." *Id.* Thus, the civil and the criminal False Claims Act apply *only* to false statements made in attempt to plunder the Treasury -- that is, unlike the False Statements Act, they are restricted to cases involving *pecuniary or proprietary harm*.[16]

The Court next commented on this issue in *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). In *Rex Trailer*, this Court ruled -- in the context of a non-FCA case -- that specific, quantifiable damages need not be proven in every case in which some pecuniary or proprietary injury is plainly evident. The defendants in *Rex Trailer* violated a statute which provided damages and penalties similar to that of the FCA by falsely using the names of veterans in order to purchase government-owned trucks. The defendants argued that the government suffered no harm because they had paid the

[16] After *Gilliland*, this Court again reiterated that defrauding the government meant committing a *pecuniary or proprietary* crime -- *i.e.*, a plundering of the Treasury -- in *Bridges v. United States*, 346 U.S. 209 (1953). In that case, this Court held that the Wartime Suspension of Limitations Act, which suspended the statute of limitations to permit the government to prosecute wartime frauds committed by government contractors, did not apply to false statements about Communist Party membership made to obtain a Certificate of Naturalization. This Court ruled that the 1942 version of the Wartime Suspension of Limitations Act -- which applied generally "to offenses involving the defrauding or attempts to defraud the United States . . ." -- did *not* apply to the false *statements* provision of the 1934 criminal FCA amendments addressed in *Gilliland*, *id.* at 220-21. Rather, it applied only to "the defrauding of the United States in any *pecuniary manner or in a manner concerning property*." *Id.* at 221 (emphasis added).



government's offering price for the vehicles. The government, however, was not disposing of the trucks as a commercial vendor, but as a benefits package for war veterans and a source of trucks for other government agencies. *Id.* at 150. The statute gave veterans a priority opportunity to buy the trucks at favorable prices and credit terms, which constituted "benefits" of "great value" because the government's surplus of such trucks was limited, *id.*, and a severe shortage of civilian vehicles was causing non-veteran truck purchasers to suffer black and gray market conditions. *United States v. Rex Trailer Co.*, 218 F.2d 880, 884 (7th Cir. 1955), *aff'd*, 350 U.S. 148 (1956). The government thus suffered proprietary harm when the defendants swindled it out of the trucks it had *earmarked and priced* as part of a benefits package intended for a specific class of beneficiaries. Moreover, because government agencies had second priority after veterans under the statute, "the government did sustain injury due to the . . . decrease of motor vehicles available to Government agencies" that resulted from the defendants' fraud. *United States v. Halper*, 490 U.S. at 445 (emphasizing that *Rex Trailer* imposed penalties as liquidated damages for *actual financial loss to the government*).[17]

Even instances of fraud with potential -- but still inchoate -- fiscal ramifications do not fall within the scope of the FCA. In *United States v. McNinch*, 356 U.S. 595 (1958), this Court held that the civil False Claims Act does not impose liability for a false application for credit insured by the Federal Housing Authority ("FHA"). Officers of a home construction business had submitted fictitious credit reports and

[17] In the course of making the uncontroversial observation that specific damages (as opposed to harm) need not be shown, *Rex Trailer* also appears to suggest in dicta that a showing of actual harm was not necessary. *See* 350 U.S. 148, 153 n.5. This Court's decision in *Halper*, however, emphasized that actual harm was in fact shown in both *Hess* and *Rex Trailer*. *See* 490 U.S. at 444-46. Moreover, *Rex Trailer* addressed a claim under the Surplus Property Act of 1944, 40 U.S.C. § 489, not the FCA.

misrepresented the financial eligibility of certain homeowners for loans backed by the FHA. *Id.* at 597 & n.4. Because there was no default at issue, this Court did not decide whether a lending institution's claim for reimbursement on a defaulted loan procured by fraud would constitute a claim covered by the FCA. *Id.* at 599 n.6. The Court did hold, however, that the fraudulent credit applications themselves did not fall within the scope of the FCA because "[i]n agreeing to insure a home improvement loan *the FHA disburses no funds nor does it otherwise suffer immediate financial detriment.* It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any." *Id.* at 599 (emphasis added). The Court concluded in *McNinch* that while "Congress wanted to stop . . . plundering of the public treasury, . . . it is equally clear that *the False Claims Act was not designed to reach every kind of fraud practiced on the United States.*" *Id.* (emphasis added).[18]

Finally, in *United States v. Halper*, 490 U.S. 435 (1989), the Court addressed the issue of whether the Double Jeopardy Clause prohibited the imposition of grossly disproportionate penalties under the civil False Claims Act after the defendant had previously been convicted of criminal false claims for the same fraudulent submissions. In *Halper*, there was no question that the defendant had caused a financial loss to the Federal treasury. In that context, the Court held that allegedly "civil" penalties of $130,000 were so "grossly disproportionate" to the loss to the Treasury ($585) that imposition of those so-called "civil" penalties was punitive and thus barred by the Double Jeopardy Clause. The Court in *Halper* summed up this Court's holdings in *Hess* and *Rex Trailer* as follows:

[18] In *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), False Claims Act liability attached when federal money was loaned in reliance of a fraudulent loan application because, unlike *McNinch*, the defendant made "a false statement with the purpose and effect of inducing the Government immediately *to part with money*." *Id.* at 232 (emphasis added).



> The relevant teaching of these cases is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly *remedial sanction that does not remotely approximate the Government's damages and actual costs*, and rough justice becomes clear injustice.

490 U.S. at 446 (emphasis added). The Court's analysis in *Halper*, as in *Hess* and the prior decisions, assumed that some substantial financial loss to the Federal treasury had occurred, and that the damages and penalty provisions of the False Claims Act were designed to reimburse the government for these actual losses. In this long line of cases, the False Claims Act has not been applied when a regulatory violation or other false statement results in no financial loss to the Federal treasury.

### B. The Court Of Appeals Holding Misinterprets The Language Of The Act And This Line Of Decisions

Notwithstanding the century-old understanding that False Claims Act liability is triggered only by *pecuniary* or *proprietary* harm, the Ninth Circuit ruled below that despite a showing that Hughes' regulatory violation cost the government *nothing*, such violation "creates a genuine issue of material fact relating to a violation of the False Claims Act." *United States ex rel. Schumer v. Hughes Aircraft, Co.*, 63 F.3d 1512, 1525 (9th Cir. 1995). The Ninth Circuit, purporting to rely on this Court's decision in *Rex Trailer Co. v. United States*, 350 U.S. 148, held that "the *lack of a determination of actual harm*

from the CAS violation does not preclude a claim under the FCA." *Schumer*, 63 F.3d at 1525 (emphasis added).

The Ninth Circuit misread *Rex Trailer*. Nothing in *Rex Trailer* converts the remedial civil False *Claims* Act into a punitive civil False *Statements* Act, which is the effective result of abandoning the FCA's requirement that liability attach only upon pecuniary or proprietary injury to the government. In *Rex Trailer*, a non-FCA case, the government suffered financial loss because surplus government property designed to be sold either to veterans or to other government agencies was instead purchased by persons not eligible to receive the benefit. Rather than trying to prove specific damages (by, for example, estimating the difference between market prices and credit terms and the government surplus prices and terms) the government simply requested penalties under the statute's civil penalties provision. This Court ruled in *Rex Trailer* that the civil penalties provision properly served to remedy the actual harm to the government by functioning as liquidated damages; it did *not penalize* the defendants for falsity which caused *no actual harm*.[19] In contrast, the Court of Appeals decision at issue here concludes that Hughes should be penalized under the False Claims Act for an alleged violation of an accounting regulation which saved the government money. The only actual harm

[19] An example of applying penalties to reimburse the government for actual losses that are difficult to quantify is *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996). In *Advance Tool*, the defendant sold the government tools which did not meet certain required contract specifications, but were used by the government. Because of the difficulty of locating the nonconforming tools, the court found that the government could not prove actual damages, even though the government did prove that the nonconforming tools provided by the defendant were not as valuable as the tools that met specifications. The court, however, imposed civil penalties as a form of rough justice to compensate for the government's actual -- but unproven -- financial loss.



Schumer alleges is that the government paid the auditors who investigated Hughes. *See* Opp. at 11-12.

When the *only* concrete harm that Schumer can allege is the cost of the same government investigation which prompted the government to withdraw its finding of noncompliance, he is essentially asking this Court to convert the FCA into a civil False Statements Act designed to fund Federal auditors. To apply civil penalties in the absence of any financial loss, relying solely on routine investigative and audit costs, would divorce the FCA from its remedial purpose. The False Claims Act was intended "to provide restitution to the government of money taken from it by fraud," and Congress included civil penalties only to "*make sure* that the government would be made completely whole." *United States ex rel. Marcus v. Hess*, 317 U.S. at 552-53 (emphasis added).[20]

The FCA was not intended to "remedy" the cost of routine government functions; rather, it was intended to remedy the cost of contractors swindling the government. Civil penalties may serve a remedial purpose when applied to make

[20] A recent criminal mail fraud case in the healthcare context illustrates well the principle that even a violation of a criminal regulatory statute does not necessarily constitute fraud. In *United States v. Jain*, 93 F.3d 436, No. 95-2014, 1996 WL 444885 (8th Cir. Aug. 8, 1996), Dr. Jain, a psychologist, was convicted of violating both the mail fraud statute, 18 U.S.C. § 1341 and the Medicare Anti-Kickback Act, 42 U.S.C. § 1320a-7b, by soliciting and receiving kickbacks for referring Medicare patients to a hospital for psychiatric care. The evidence at trial showed, and the government eventually conceded, that the patients were appropriately hospitalized, and several government witnesses testified that the hospital was "likely the best acute-care psychiatric hospital in the region." *Id.* at *2. In short, there was no evidence that the patients received substandard or unnecessary care, or that the government paid a penny more than it would have paid in the absence of Dr. Jain's kickback scheme. *Id.* Although the Eighth Circuit affirmed his conviction under the Anti-Kickback Act, it held that because there was no financial loss to the government, Dr. Jain's illegal kickback scheme did not constitute mail fraud, and the mail fraud conviction was reversed. *See id.* at *4-*6.

sure that the treasury has received full restitution -- including restitution for ancillary costs of fraud -- but such penalties can only be described as punitive when applied to penalize a harmless failure to disclose accounting methods. Absent some actual loss, there is nothing to remedy. It is clear, and this Court has repeatedly recognized, that the FCA is intended to remedy harm caused by fraud and that Congress never intended for the FCA to penalize false statements resulting in no financial loss in order to fund the payroll for government auditors and accountants.

While government contractors and others who receive or spend Federal funds may violate government laws and regulations, it simply does not follow that such regulatory violations defraud the government when they cause no harm to the public fisc. *Amici* strongly urge this Court to state -- yet again, as it has repeatedly since the adoption of the Act -- that the civil False Claims Act serves the remedial function of recouping the government's actual pecuniary and proprietary losses caused by fraud, and does not serve as an enforcement mechanism for other statutes, or as a means of punishing all false statements somehow connected to the government's procurement of goods and services. To impose such civil penalties when there has been no loss to the Federal treasury is not remedial and is not justified by the language or the purpose of the FCA. However, such is the effect of the Ninth Circuit's ruling below. Accordingly, the Ninth Circuit's opinion below should be reversed.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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# APPENDICES

## U.S. DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 18, 1995

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## JUSTICE DEPARTMENT RECOVERS OVER $1 BILLION IN QUI TAM AWARDS AND SETTLEMENTS

WASHINGTON, D.C. — The Department of Justice has recovered more than $1 billion in civil fraud cases brought under the whistleblower provisions of the False Claims Act since they were amended in 1986.

Frank W. Hunger, Assistant Attorney General for the Civil Division, praised the work of Senator Charles Grassley of Iowa and Representative Howard L. Berman of California in announcing the figure today. Grassley and Berman sponsored the 1986 whistleblower provision, also know as the *qui tam* amendments to the False Claims Act, which significantly strengthened the statute.

The statute allows a citizen, also known as a "relator," to file suit on behalf of the United States alleging that a person has submitted false or fraudulent claims on the United States. The government has a period of time to investigate the allegations to determine whether to take over the suit or allow the private citizen to pursue it alone. The private citizen may recover from 15 percent to 25 percent of the settlement or judgment if the government takes over the case and prosecutes it successfully and the same amount if the whistleblower litigates the case.

"This is a remarkable achievement for the taxpayers of this country," said Hunger. "Senator Grassley and Representative Berman must be commended for their leadership and

vision in sponsoring the legislation that has been used so effectively in the nine years since its enactment.

"The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against fraudulent use of public funds."

Of the total amount recovered since 1986, the Department intervened in or settled cases resulting in recoveries of $1,058,177,552. Relators, or "whistleblowers," have been awarded $184,470,378 or 17.87 percent of the government's proceeds where shares have been determined.

In cases declined by the government, private citizens obtained settlements or judgments of $15,597,141. Their shares have averaged 28 percent of the proceeds where shares have been determined, or $3,412,661.

"The *qui tam* amendments were intended to encourage private citizens to come forward with information about fraud against the federal government," said Hunger. "Obviously they are working very well.

"These recoveries could not have been achieved without the outstanding and tireless efforts of the attorneys in the Civil Division and the U.S. Attorneys' offices throughout the country working in cooperation with agency investigators," Hunger stressed.

The largest *qui tam* recovery to date was a $150 million agreement with United Technologies Corporation to settle a lawsuit filed by a former vice president of finance alleging that the company overstated progress payments submitted by its Sikorsky Aircraft Division and misrepresented the facts in reporting the fraud to the government through the Department of Defense's Voluntary Disclosure Program. The relator received $22.5 million, the largest recovery by a whistleblower to date.

Other significant cases include a $112.5 million agreement with Teledyne Inc. to settle two *qui tam* cases involving



Teledyne's former Relays Division and Teledyne Systems Company. The government charged the company with fraud in testing military components and in its costs accounting practices.

An $88 million settlement on September 30 with Lucas Industries pushed *qui tam* recoveries over $1 billion. That settlement resolved a *qui tam* lawsuit filed in Utah that alleged that Lucas defrauded the government by providing defective military parts and falsifying testing and quality control reports.

Attached are *qui tam* statistics through fiscal 1995.

## QUI TAM STATISTICS

Number of *qui tam* cases filed at end of fiscal 1995: 1,105

Number where a recovery has been obtained under the False Claims Act: 153

Qui Tam Filings By Fiscal Year:

FY 87 -33 cases
FY 88 -60 cases
FY 89 -95 cases
FY 90 -82 cases
FY 91 -90 cases
FY 92 -119 cases
FY 93 -131 cases
FY 94 -221 cases
FY 95 -274 cases

Qui Tam Recoveries (approximate):

FY 88 -$ 2 million
FY 89 -$32 million
FY 90 -$40 million
FY 91 -$36 million

FY 92 -$124 million
FY 93 -$193 million
FY 94 -$379 million
FY 95 -$243 million

Total fraud recovery from FY 87 through FY 95: $3, 342, 390, 684
(qui tam recoveries are about one-third of total)

Defense fraud and health care fraud recoveries, as percentages of total recoveries:

FY 87-37% defense fraud, 16% health care fraud
FY 88-85% defense fraud, 1% health care fraud
FY 89- 79% defense fraud, 8% health care fraud
FY 90-65% defense fraud, 3% health care fraud
FY 91-83% defense fraud, 4% health care fraud
FY 92-70% defense fraud, 5% health care fraud
FY 93-29% defense fraud, 46% health care fraud
FY 94-53% defense fraud, 38% health care fraud
FY 95-48% defense fraud, 36% health care fraud

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DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Inspector General

Washington, D.C. 20201

June 21, 1996

Jordan J. Cohen, M.D.
President Association of American Medical Colleges
2450 N. Street, N.W.
Washington, D.C. 20037

Dear Dr. Cohen:

The purpose of this letter is to apprise you of activities in my office that may be of interest and concern to members of your organization. Specifically, the Department of Health and Human Services, Office of Inspector General (OIG), has initiated a series of nationwide reviews of compliance with rules governing physicians at teaching hospitals (PATH) and other Medicare payment rules. This initiative grows out of the extensive work performed by the OIG at a major east coast university. The focus of the review was compliance with Intermediary Letter 372 (IL 372), the Medicare rule affecting payment for physician services provided by residents. We found that the institution was not complying with this rule. We also found that teaching physicians were improperly "upcoding" the level of service provided in order to maximize Medicare reimbursement. This review resulted in the Government's recovery of more than $30 million, including damages under the Federal Civil False Claims Act. As part of the negotiated settlement, the responsible parties also avoided program exclusion under the OIG's authorities.

The OIG has initiated the PATH project in order to determine whether, and to what extent, similar problems are present at other teaching institutions throughout the country. The nationwide PATH reviews will focus on compliance with IL 372 and the appropriateness of service codes. In addition, the OIG encourages physician group practices affiliated with teaching hospitals to examine their own practices under these Medicare requirements. Interested group practices that choose to participate actively in such a process, under a protocol established by the OIG, may potentially reduce their legal exposure, if any, under the OIG's exclusion authorities.

Active participation includes arrangement, at the party's expense, for an independent review conducted by a third party, using the OIG's review protocol. A prospective party must be an institution that receives graduate medical education payments under Medicare Part A. To receive the benefits of active participation in a PATH review, a party must adhere to principles set out in the review protocol, such as the following:

- The party will not engage, for the purposes of the independent review, any individual or entity that has previously provided advice or consultation to the party with respect to the matter under review.
- The party will waive any privileges or other rights to withhold any documents, as requested by the Government and relating to the review, including documents otherwise protected by the attorney-client privilege and the work product doctrine.
- The Government will receive all draft reports of the independent review concurrently with the party, and the party will afford the Government the opportunity to be present for any discussions with the reviewer relating to the review.



- The party understands that the Government reserves the right to conduct its own review, of any scope, during the pendency of the review process, and to refer matters when appropriate to other Federal authorities such as the Department of Justice.

The OIG will give favorable treatment, to the degree permitted by law, to the party's bona fide participation and cooperation under the protocol. Favorable treatment may include:

- generally crediting the independent reviewer's reasonable and verifiable damages estimate for the purposes of determining overpayment;
- according substantial weight to the level of participation and cooperation in determining whether to exclude the party under the OIG's exclusion authorities; and
- making the party's level of participation and cooperation known to other Federal officials in the event that the OIG's statutory obligations require referral to the matter under review.

We are writing to inform you about our activities under PATH because some of your members may be interested in participating and working with us to resolve any issues that may arise under a PATH review.

The OIG is committed to working with responsible parties to resolve their liabilities relating to the matters under review, if any, and to assure future compliance with Medicare laws,

regulations and payment rules. Parties interested in actively participating in the PATH reviews should contact:

Ms. Ellen Bechkes, Audit Manager
Department of Health and
Human Services
Office of Inspector General
Office of Audit Services
N2-25-26
7500 Security Boulevard
Baltimore, MD 21244-1850
(410) 786-7104

Thank you for your assistance in notifying your members of our work in this area.

Sincerely,

/s/

June Gibbs Brown
Inspector General